

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI Ā TARA ROHE**

[2023] NZERA 174  
3188019

BETWEEN	RAJBIR KAUR First Applicant
AND	VU HOANG YEN (WENDY) DUONG Second Applicant
AND	SHEERO JOGA INVESTMENTS LIMITED First Respondent
AND	RAKESH KUMAR Second Respondent
AND	JOGA SINGH CHAMBER Third Respondent

Authority Member:	Natasha Szeto
Representatives:	Graeme Ogilvie, advocate for the Applicants No appearance for the Respondents
Investigation Meeting:	2 February 2023
Determination:	12 April 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In April 2021, Rakesh Kumar told the workers of Abode Café in Lower Hutt that the café was closing immediately.

[2] The Applicants both worked at Abode Café. Ms Kaur had worked at Abode under a previous owner, and then for Mr Kumar for almost two years. She started as a

Café Supervisor and was promoted to Café Manager. Ms Duong had been employed as a Café Assistant for only a few months.

[3] After the meeting on 18 April 2021, no overdue wages or final pay were paid to Ms Kaur or Ms Duong, and they each brought a claim to the Employment Relations Authority against their employer, Sheero Joga Investments Limited (Sheero Joga, or the company).

[4] The Authority first held an investigation meeting on 10 May 2022. Both Applicants attended with their representative, but no-one was present for the company.

[5] The Authority ordered:<sup>1</sup>

- (a) Sheero Joga to pay Rajbir Kaur a total of \$8,279.00 (gross) in unpaid wages, wages for her notice period, and unpaid annual leave.
- (b) Sheero Joga to pay Wendy Duong a total of \$4,920.00 (gross) in unpaid wages, wages for her notice period, and unpaid annual leave.
- (c) Sheero Joga to pay each applicant \$2,000 in costs.

[6] Those unpaid wages and costs remain unpaid. The Applicants now seek a compliance order against Sheero Joga and leave of the Authority to recover their wages and other money directly from the two directors of the company – Mr Rakesh Kumar and Mr Joga Singh Chamber. They also seek costs for this proceeding.

### **The Authority's investigation – procedural history**

[7] An investigation meeting was held on 2 February 2023 with both Applicants attending remotely via Teams. There was no appearance by – or for – Sheero Joga, Mr Kumar or Mr Chamber.

[8] The Authority has the power to proceed under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), if any party, without good cause, fails to attend, and may act fully in the matter before it, as if that party had duly attended or been represented.

[9] Authority records show the Statement of Problem was sent to Sheero Joga's registered office in September 2022.

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<sup>1</sup> *Duong and Anor v Sheero Joga Investments Limited* 2022 NZERA 227.

[10] In October 2022, the Authority tried to convene a case management conference with the parties. Notice of the conference was sent to the directors of the company by the Authority in October, and was returned to the Authority in December. None of the Respondents attended the conference.

[11] Directions sent to the parties set a timetable for lodging submissions and provided a further opportunity for Sheero Joga to respond to the Applicants' claims in writing.

[12] I am satisfied that the Notice of Investigation Meeting was served on Sheero Joga at its registered address for service in October 2022.

[13] I am also satisfied that the Notice of Investigation Meeting was served on the two directors at their last known residential address, as listed on the Companies' Office record. That address is also the address of the Registered Office, and Address for service of the company.

[14] Included in the notice that Sheero Joga, and each of the two directors received, was advice that if the respondent(s) did not attend the investigation meeting, the Authority may, without hearing the evidence from the respondent, issue a determination in favour of the applicant.

[15] The Respondents were given multiple opportunities to participate in the Authority's proceedings. No reason was provided by the Respondents for their non-attendance at the investigation meeting on 2 February 2023, and the investigation meeting proceeded.

[16] Written witness statements were lodged from Ms Kaur and Ms Duong, and they both answered questions from me under affirmation. Mr Ogilvie made submissions on their behalf.

[17] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received.

## **Discussion**

### *Whether a Compliance Order should be issued against Sheero Joga Investments Limited*

[18] Imposing a compliance order is a serious matter. If Sheero Joga fails to comply with the compliance order, the Applicants can pursue the breach in the Employment Court or the District Court. The Employment Court has significant powers including that it can fine the person up to \$40,000, and order property to be sequestered. Alternatively, the Applicants could obtain a certificate of determination from the Authority and obtain enforcement in the District Court.

[19] Although Sheero Joga remains registered on the Companies Office register, it is overdue in its obligation to file an annual return and the Registrar has initiated action to remove the company from the register.

[20] Given the company's history of non-engagement in the Authority's proceedings, it is appropriate for the company to be issued with a Compliance Order so that the Applicants have this avenue to recover unpaid wages, annual holiday pay and costs against the first Respondent.

### *Whether the Applicants should be granted leave to recover wage arrears from Mr Kumar and Mr Chamber personally*

[21] The Applicants have asked the Authority to grant them leave under s 142Y(2) of the Act to recover unpaid wages and annual holiday pay from Mr Kumar and Mr Chamber personally, as directors of Sheero Joga.

[22] To decide whether I should grant leave, I must answer the following:

- (a) Has there been a default in the payment of wages or other money payable to the employee?
- (b) If so, is the default due to a breach of employment standards?
- (c) If so, is Mr Kumar and/or Mr Chamber a person involved in a breach of employment standards?
- (d) If so, is the employer unable to pay the arrears in wages or other money?

*Has there been a default in the payment of wages or other money payable to the Applicants?*

[23] Both Ms Kaur and Ms Duong confirmed at the investigation meeting that they have not been paid anything by any of the Respondents since the Authority's determination was issued on 31 May 2022. They both gave evidence that their representative has not received any payment from the company on their behalf. I accept their evidence as credible. I conclude that there has been a default in the payment of wages or other money to the Applicants.

*If so, is the default due to a breach of employment standards?*

[24] "Employment standards" are defined in s 5 of the Act.

[25] The Wages Protection Act 1983 requires an employer to pay the entire amount of wages to a worker when they become payable (s 4). The provisions of the Wages Protection Act 1983 are covered by the definition of 'employment standards' and therefore the failure to pay a worker's wages is a default due to a breach of employment standards.

[26] The Holidays Act 2003 provides for minimum entitlements and payments for annual holidays. These minimum entitlements and payments are also covered by the definition of 'employment standards' and therefore the failure to pay annual holiday pay to employees is also a default due to a breach of employment standards.

[27] However, the non-payment of costs is not covered by the definition of employment standards in the Act.

[28] I conclude that the non-payment of wages and annual holiday pay are due to a breach of employment standards. This amounts to:

- (a) Ms Kaur: \$8,279.00 (gross)
- (b) Ms Duong: \$4,920.00 (gross)

*If so, are the directors involved in a breach of employment standards?*

[29] A person is involved in a breach under s 142W of the Act if they have a certain legal status and they have acted in a particular way, and they do not have a legal defence.

[30] Relevant to this matter, a person can only be involved in a breach by a company if they are an officer of the company (s 142W of the Act). This includes directors.

[31] There are multiple ways that a person's actions can involve them in a breach of employment standards. The Applicants submit that Mr Kumar and Mr Chamber aided and abetted the breaches. They may also have directly or indirectly been knowingly concerned in, or party to, the breach.

[32] The level of knowledge required to establish liability for a person involved in a breach of employment standards is knowledge of the essential facts that establish the contravention by the employer.<sup>2</sup>

[33] The legal defence as set out in s 142ZD of the Act relates to reasonable reliance on information supplied by another person, or taking all reasonable and proper steps to ensure compliance. No evidence is before me to support that the legal defence is available, and so I find that it is not available to either Mr Kumar or Mr Chamber.

Was Mr Kumar a person involved in a breach of employment standards?

[34] Mr Kumar was appointed a director of Sheero Joga on 8 May 2019.

[35] Mr Kumar formally hired all the workers at Abode Café, including Ms Kaur and Ms Duong. He signed the Applicants' individual employment agreements on behalf of the company.

[36] Ms Kaur worked for Abode Café's previous owner before Sheero Joga took over the café. Rakesh Kumar was introduced to Ms Kaur as 'the new owner' by the previous owner. Mr Kumar initially worked alongside Ms Kaur as front of house staff through June and July 2019, but he then started to come in later than Ms Kaur, and to work weekends.

[37] Mr Kumar promoted Ms Kaur to Café Manager in December 2019, when the existing Manager resigned. Ms Kaur's role involved checking the staff timesheets for the staff who worked Monday to Friday and providing them to Mr Kumar to be paid. She always reported to Mr Kumar. When workers had any issues - including with late pay - they contacted Mr Kumar directly. This was usually by text, but Ms Kaur also contacted Mr Kumar by phone.

[38] Ms Duong started working at Abode Café after she answered a Facebook ad and was interviewed by Ms Kaur for the position of Café Assistant. The day after the

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<sup>2</sup> *Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at 59 and 42.

interview, Mr Kumar called her to say that she had the job, and he offered her an employment agreement.

[39] Ms Duong's role involved working as 'front of house': cleaning, doing dishes and dealing with customers. She never worked with Mr Kumar in the café, nor did she speak to him directly. Ms Duong was paid by Sheero Joga. If her wages were late, Ms Duong would text Mr Kumar, but she never spoke to him on the phone.

[40] Ms Kaur believed that Mr Kumar and Mr Chamber were the 'decision-makers' for the company, based on the business being a family business, and her understanding about the ownership of the company.

[41] When the café closed down, it was Mr Kumar who called the staff meeting to advise workers. Ms Kaur was present at this staff meeting.

[42] Ms Duong was not at the staff meeting, and she found out about the café closing when Mr Kumar sent her an email from the Abode Café Manager email address following the meeting. Ms Duong asked Mr Kumar by return email whether she would be paid for the time that the café would be closed (effectively her notice period) and holiday pay. Mr Kumar confirmed that they would be selling all assets to clear all unpaid wages and bills.

[43] Based on the evidence of Ms Kaur and Ms Duong, I find that Mr Kumar had knowledge of the essential facts that establish contravention by the employer.

[44] Mr Kumar was deeply and personally involved in Abode Café's day-to-day management. He was the 'hands and mind' through which Abode Café operated and was the only person in control of the business. He also demonstrated direct knowledge that overdue wages were owing to staff, as set out in his email to Ms Duong of 18 April 2021. He therefore aided and abetted the breaches.

[45] It follows that Mr Kumar was a person involved in the breaches of employment standards by the company.

Was Mr Chamber a person involved in a breach of employment standards?

[46] Mr Chamber was appointed as a director of Sheero Joga on 1 May 2019.

[47] Mr Chamber resides in Hawkes Bay and he was not involved in the day-to-day running of the café.

[48] Mr Chamber and his wife came into the café occasionally, but they did not have much communication with the staff. Ms Duong saw Mr Chamber in the café a couple of times, but she did not speak to him. She only knew who he was because the other staff told her that was Rakesh's father.

[49] Ms Kaur only knew Mr Chamber as 'Joga Singh' or 'Joga Kumar' and had never heard the name 'Joga Singh Chamber'.

[50] Ms Kaur had Mr Chamber's cell phone number, but she never spoke to him on the phone, and her contact with him was sporadic. If she or any of the workers tried to raise issues relating to the business with Mr Chamber, Mr Chamber directed them back to Mr Kumar saying: "Rakesh is your boss and you need to deal with him".

[51] Mr Chamber was not at the meeting on 18 May 2022 when Mr Kumar told the staff that the café was closing.

[52] Given his limited involvement with the café business, I am not satisfied that Mr Chamber had knowledge of the essential facts that establish contravention by the employer.

[53] It follows that he was not a person involved in the breaches of employment standards by the company.

*If so, is the company unable to pay?*

[54] I am satisfied that the company is currently unable to pay the unpaid wages and annual leave. The Companies Office record shows that the company registration is not being maintained, the company is overdue in its obligation to file an annual return, and the Registrar has initiated action to remove it from the register. None of the Respondents have engaged with any communications from the Applicants or the Authority.

### **Costs**

[55] The Applicants have applied for costs arising from this proceeding to be awarded.

[56] The power of the Authority to award costs is set out in Schedule 2, clause 15 of the Act.

[57] Costs are at the discretion of the Authority and must be reasonable.<sup>3</sup> The approach to awarding costs, and the underlying principles, are well settled.<sup>4</sup> Costs awarded in the Authority generally start from the daily tariff, with adjustments made as appropriate to the circumstances of the case.<sup>5</sup> Awards made should be modest, and consistent with the Authority's equity and good conscience jurisdiction.

[58] The Applicants are entitled to a contribution towards their costs. I estimate that if the Respondents had attended the investigation meeting the matter would have taken up to half a day. Accordingly, Sheero Joga and Rakesh Kumar are ordered (on a joint and several basis) to pay costs of \$2,000.00 to each Applicant.

### **Orders**

[59] Under s137(2) of the Act, Sheero Joga Investments Limited is ordered to comply with the determination of the Authority issued on 31 May 2022, and to make the following payments:

- (a) To Ms Rajbir Kaur: \$8,279.00 (gross) plus \$2,000 costs.
- (b) To Ms Wendy Duong: \$4,920.00 (gross) plus \$2,000 costs.

This order must be complied with by no later than 28 days from the date of this determination.

[60] Rakesh Kumar was a person involved in the breaches of employment standards in terms of s 142W of the Act. The Authority grants the Applicants leave under s142Y(2)(a) of the Act to seek to recover from Mr Kumar personally, unpaid wages and unpaid annual holiday pay that Sheero Joga Investments Limited was ordered to pay the Applicants for breaches of employment standards, but which Sheero Joga Investments Limited was unable to pay. This amounts to \$8,279.00 (gross) to Ms Kaur, and \$4,920.00 (gross) to Ms Duong.

[61] Sheero Joga Investments Limited and Rakesh Kumar are ordered to pay costs of this proceeding of \$2,000.00 to Rajbir Kaur.

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<sup>3</sup> *NZ Automobile Association Inc v McKay* [1996] 2 ERNZ 622.

<sup>4</sup> *PBO Limited (formerly Rush Security Ltd) v Da Cruz* EMC Auckland AC28/06, 12 May 2006.

<sup>5</sup> Practice Note 2: Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi, 29 April 2022.

[62] Sheero Joga Investments Limited and Rakesh Kumar are ordered to pay costs of this proceeding \$2,000.00 to Vu Hoang Yen (Wendy) Duong.

**Natasha Szeto**  
**Member of the Employment Relations Authority**